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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

LARNEL D. ANDERSON,

Defendant and Appellant.

B292973

(Los Angeles County
Super. Ct. No. TA144003-02)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tammy Chung Ryu, Judge. Reversed in part, affirmed in part and remanded.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Joseph P. Lee and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

Larnel D. Anderson was convicted following a jury trial of first degree murder, attempted premeditated murder, home invasion robbery, false imprisonment by violence or menace, burglary and resisting a peace officer; the jury also found true several related enhancements. After admitting one prior serious or violent felony conviction within the meaning of the three strikes law, Anderson was sentenced to an aggregate indeterminate state prison term of 107 years to life.

On appeal Anderson contends the trial court erroneously denied defense counsel's *Batson/Wheeler* motion asserting the prosecutor had improperly exercised a peremptory challenge to a prospective alternate juror.¹ He also contends the court committed prejudicial error in failing to provide additional instructions in response to jury questions regarding first degree murder and premeditation, the evidence was insufficient to prove false imprisonment by violence, and the court erred in failing to instruct on misdemeanor false imprisonment as a lesser included offense. Finally, he argues the court committed error when sentencing him for attempted premeditated murder and by failing to find he had the ability to pay before imposing fines and assessments.

¹ See *Batson v. Kentucky* (1986) 476 U.S. 79, 89 ("the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant"); *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 ("the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution").

We agree the trial court committed prejudicial error in failing to instruct sua sponte on misdemeanor false imprisonment as a lesser included offense of false imprisonment by violence or menace, otherwise affirm Anderson's convictions and remand for retrial or resentencing. On remand the trial court must correct its error with respect to the proper sentence for attempted premeditated murder and provide Anderson an opportunity to request a hearing on, and present evidence concerning, his ability to pay fines, fees and assessments.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Information

Anderson was charged in an amended information filed April 16, 2018 with the murder of Esmeralda Roman (Pen. Code, § 187, subd. (a))² (count 1); the attempted willful, deliberate and premeditated murder of Luis Allas (§§ 664, 187, subd. (a)) (count 2);³ a home invasion robbery (§ 211) (count 4); the false imprisonment by violence or menace of Sung Yi Kang (§§ 236, 237) (count 5); first degree residential burglary (§ 459) (count 6); and resisting a peace officer (§ 148, subd. (a)(1)) (count 8).⁴ It was

² Statutory references are to this code unless otherwise stated.

³ The amended information incorrectly spells Allas's name as Alas.

⁴ Evelyn Marie Rivera, Anderson's girlfriend, was charged along with Anderson in the counts alleging murder and attempted murder and was also charged as an accessory after the fact to the murder (§ 32) (count 3). Phillip Dawayne Ridge, like Anderson a member of the Grapes Street Crips criminal street gang, was charged along with Anderson in the counts alleging home invasion robbery, false imprisonment by violence and

specially alleged as to the murder and attempted murder counts that a principal had personally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (b)-(e)), and as to the felonies alleged in counts 1, 2, 4, 5 and 6 that the offenses had been committed for the benefit of a criminal street gang (§ 186.22, subd. (b)). Finally, it was specially alleged Anderson had a prior serious or violent felony conviction (robbery) within the meaning of the three strikes law (§§ 667, subds. (b)-(j), 1170.12).

2. Evidence at Trial

a. The home invasion robbery

Mid-morning on June 28, 2016 two men wearing masks and gloves broke into Kang's home in Glendale. One man was dressed in black; the second wore camouflage-type clothing. When Kang first saw them, one of the intruders was holding a pair of scissors with a black handle. Kang screamed and fell to the ground. In response, one of the men told her to stand and then to sit in a chair, where he unsuccessfully attempted to tie her with an electric cord. A subsequent attempt to tie a pillowcase over her mouth was also unsuccessful.

The men told Kang to remain quiet and assured her they did not intend to hurt her. While one of the men remained guarding Kang, the second searched the house for valuables, looking through, and taking items from, her purse, dresser drawers and closets. The perpetrators then directed Kang to go inside her husband's closet. Before the door was closed, Kang asked for water. One of the men brought her a cup from the

burglary and separately charged with obstructing a peace officer (count 9). Rivera was tried jointly with Anderson and acquitted on all charges.

bathroom. After being shut in the closet, Kang heard what sounded to her like a voice on a speaker urgently telling the men to end the episode. Once Kang heard a car accelerating, she left the closet and telephoned the police.

Kang testified that, while she was in the intruders' presence, she prayed, repeating, initially in Korean and then in English, "Dear Lord, please forgive them. They don't know what they are doing." Kang explained she wanted the men to understand that she was praying for their forgiveness. Asked if the men were yelling when they spoke to her, Kang replied, "No. It was very soft voice." Asked if they were mean to her, she answered, "They were very nice. When I keep on praying it, the guy was responding, 'Don't worry. We won't hurt you. Just be quiet.' He was keep on repeating the same phrase."

b. *The shooting of Roman and Allas*

On the morning of June 29, 2016 Allas had an altercation with several people in a dark-colored Mercedes.⁵ Later that morning Allas and Roman drove past a barbershop in Wilmington where Roman was training to be a barber. As Allas was slowing his car to park, a purple Mercedes approached behind it. The top third of a man's body was visible above the roof of the Mercedes; he was either sitting on the passenger side window frame or extending out the sunroof. The man, later identified as Anderson by three witnesses in or near the barbershop, had a gun and fired multiple shots at the rear of Allas's car. Allas initially stopped the car, then accelerated up

⁵ A police surveillance camera recorded a purple Mercedes traveling inside the Jordan Downs housing development during the morning of June 20, 2016 and captured Anderson getting out of the front passenger seat of the vehicle.

the street, but quickly crashed as he was trying to assist Roman, who had been shot. The Mercedes did not follow Allas. At the hospital where Roman had been taken, Allas told Roman's father two men and a woman were inside the Mercedes and had made gang signs as they followed Allas. Roman died from the single gunshot wound she received.

Shortly after the shooting the purple Mercedes returned to the barbershop. Anderson was in the passenger seat with the window open. Speaking to the people in the shop, Anderson called out, "You think it's a game?" When somebody inside the shop responded, Anderson displayed a gun. The Mercedes then drove off. The police confirmed Anderson's fingerprints on the exterior surface of the passenger side window when the Mercedes was recovered following a crash later that day.

c. Anderson's arrest

Orange County Sheriff's deputies responded to a residential burglary call in Yorba Linda during the late afternoon of June 29, 2016, looking for two African-American men and a blue car. When Deputy David Leathers saw a blue car with paper plates parked in an unusual manner, he stopped his patrol car close to it. At that point a man, later identified as Phillip Ridge, jumped from the car and fled. Ultimately, with the use of a K-9 unit, Ridge, Anderson and two other suspects were arrested.

Deputies found a camouflage sweatshirt and a black backpack among other items in the blue car used in the crime. Anderson's cellphone was in the backpack. DNA from the sweatshirt matched Ridge.

Glendale Detective Jeffrey Davis testified that a photograph of the blue car from the Orange County burglary looked similar to the blue car captured in surveillance videos

from Kang's neighbors the morning of the home invasion robbery. In addition, cell phone records placed Anderson's and Ridge's cell phones close to each other near the Jordan Downs housing development on the morning of June 28, 2016, then again near each other in Glendale close to Kang's house and once again around noon close together by Jordan Downs.

d. *Gang evidence*

Los Angeles Police Officers Jason Valles and Adan Renteria, testifying as experts concerning the Grape Street Crips criminal street gang, explained the gang had approximately 2,500 members and claimed the area that included at its center Jordan Downs. Both Anderson and Ridge were members of Grape Street Crips. The gang's primary activities were robberies, burglaries, narcotics sales and shootings.

Based on a hypothetical about several Grape Street Crips members going from Jordan Downs to a more upscale neighborhood in Glendale or Orange County to commit residential burglaries, Officer Renteria opined the conduct was in association with, and for the benefit of, the gang. According to Renteria, money from the burglaries could be used to purchase firearms or narcotics to further the gang's criminal activities.

Based on another hypothetical that included facts similar to the shooting of Roman and Allas, Officer Renteria opined it was done for the benefit of the Grape Street Crips. Renteria explained a gang member would respond violently to any perceived disrespect, including from someone who was not a rival gang member; and the shooting would create an atmosphere of fear and intimidation that furthered both the individual's and the gang's status and reputation.

e. *Anderson's defense*

Anderson argued the People had not proved beyond a reasonable doubt he was involved in either the home invasion robbery in Glendale or the shooting on June 29, 2016. The only defense witness, Sal Vargas, was near the barbershop at the time of the shooting. He heard gunshots and, when he turned toward them, saw a man sitting on the window frame on the passenger side of an older black car, hanging out the window. He could not identify Anderson as the shooter.

3. *Verdict and Sentencing*

The jury found Anderson guilty on all charges and found true with respect to the first degree murder and attempted premeditated murder counts that a principal personally and intentionally discharged a firearm causing great bodily injury or death. The jury found not true the gang enhancement allegation as to those two counts, but found it true with respect to the robbery, false imprisonment and burglary charges. Anderson admitted his prior serious felony conviction within the meaning of the three strikes law.

The court sentenced Anderson to an indeterminate term of 25 years to life for first degree murder, doubled under the three strikes law to 50 years to life. It imposed a consecutive life term for attempted premeditated murder⁶ and a consecutive

⁶ Discussing this aspect of the sentence, the trial court initially stated, "It is a life sentence for attempted murder. It's usually deemed seven to life because a person is not eligible for parole consideration until he's served the first seven years of that life sentence. That's just on count 2. And because of his prior strike, it may actually double that. But I am sentencing him to life because those are the rules followed by Department of Corrections." The prosecutor, however, interjected that, for

indeterminate term of 30 years to life for the home invasion robbery. The court also imposed a 13-year determinate term for first degree residential burglary (the middle term of four years, doubled under the three strikes law, plus five years for the criminal street gang enhancement), to be served prior to the three consecutive indeterminate life terms. The term for false imprisonment by violence or menace was stayed pursuant to section 654, and a 364-day county jail term was imposed for resisting a peace officer to run concurrently with the state prison sentences.

The court awarded Anderson 758 days of presentence custody credit and ordered him to pay victim restitution as determined at a subsequent hearing. In addition, the court ordered Anderson to pay a \$240 court operations assessment (Pen. Code, § 1465.8), a \$180 court facilities assessment (Gov.

purposes of describing Anderson’s aggregate sentence, the indeterminate term on count 2 should be considered 14 years to life, not simply life. The court agreed.

As Anderson argues, and the Attorney General concedes, the prosecutor induced the trial court to commit error. The proper second strike sentence for attempted premeditated murder is life with a minimum parole eligibility of 14 years, not an indeterminate term of 14 years to life. (See *People v. Robbins* (2018) 19 Cal.App.5th 660, 678 [“Defendant contends his sentence for attempted murder should be life, rather than seven years to life. The People concede defendant is correct”]; *People v. Robinson* (2014) 232 Cal.App.4th 69, 72, fn. 3 [“[a] term of life with the possibility of parole does not have a minimum determinate term of seven years; rather, a person sentenced to such a term first becomes eligible for parole in seven years”].) The trial court is to correct this error when it resentences Anderson following our remand.

Code, § 70373) and a \$300 restitution fine (Pen. Code, § 1202.4, subd. (b)), and imposed and suspended a \$300 parole revocation fine (Pen. Code, § 1202.45).

DISCUSSION

1. *There Was No Batson/Wheeler Error*

a. *The excusal of Prospective Juror No. 50*

After 12 jurors had been selected and sworn, the court proceeded with the selection of four alternate jurors. When questioned during this portion of voir dire, Prospective Juror No. 50 (Juror 50), a single African-American woman with no children, stated she had worked in banking but was now retired. She had no prior jury experience. She had been the victim of a car theft, which she reported to her insurance company and the police about 12 years prior to the trial. The thief was never caught.

The following exchange then took place:

“Mr. Johnson [Anderson’s counsel]: . . . Juror Number 45, how do you feel about that? Someone has lost her life. You as an E.M.T. have seen things. Is there anything that—this might not be the right case for you, or you feel like you can take on this and keep an open mind and listen to all the evidence?

“Prospective Juror No. 45: I can be impartial.

“The Court: Juror Number 50, how do you feel about this?

“[Answer⁷]: It would be hard for me.

“The Court: I did not hear you.

⁷ The reporter’s transcript attributes this answer to Anderson’s counsel, but in context it appears to have been Juror 50’s response.

“Prospective Juror No. 50: I think I could be okay with that.

“The Court: Okay. Thank you.”

A few minutes later the prosecutor asked, first Prospective Juror No. 45 (Juror 45) and then Juror 50, “Knowing the charges against these defendants sitting down there have been proved beyond a reasonable doubt, you will—can you return a verdict of guilty of murder?” Juror 45 responded, “Yes.” The following exchange then occurred:

“Mr. Sisak [the prosecutor]: Number 50, can you?

“Prospective Juror No. 50: If I have the evidence.

“Mr. Sisak: Do you think it’s the right thing to do if the evidence is there?

“Prospective Juror No. 50: Yes.

“The Court: Is that a ‘yes’?

“Mr. Sisak: I just want to make sure the court reporter can hear you.

“Prospective Juror No. 50: Yes, if it’s—

“Mr. Sisak: You seem to be a little hesitant.

“Prospective Juror No. 50: Yes. I’m just saying it’s evidence, and I feel—yes. Yes.

“Mr. Sisak: All right. So look, we need to know that each juror has the ability.

“Prospective Juror No. 50: Yes.

“Mr. Sisak: We want you to judge the evidence. That’s the point.

“Prospective Juror No. 50: Yes.

“Mr. Sisak: If that evidence is there and you have to give a guilty verdict, can you and will you if you have enough evidence to support that decision?

“Prospective Juror No. 50: If that evidence is there.

“Mr. Sisak: You will?

“Prospective Juror No. 50: Yes.

“Mr. Sisak: All right. Juror Number 44—May I have Juror 50? Did I hear a ‘yes’?

“Prospective Juror No. 50: Yes. Definitely.

“Mr. Sisak: You’re killing me, Juror 50.

“Prospective Juror No. 50: Yes.”

The People asked to excuse Juror 50.⁸ Counsel for Anderson and Rivera requested a sidebar conference and made a “*Wheeler-Johnson* motion.” Notwithstanding the presence of three or perhaps four African Americans in the sworn panel, the trial court found a prima facie showing of discrimination had been made “because I do not know of a real obvious reason right now why Juror 50 would be released, and she is female and Black.”⁹ The court asked the prosecutor to state his reasons for the peremptory challenge.

The prosecutor reminded the court he had to repeatedly ask Juror 50 if she would vote guilty on the charge of murder if she was convinced by the evidence. He added, “Her actual demeanor was very hesitant, very delayed. Even as I got her to say yes, as I started to move on she actually said, ‘I guess,’ rather than continue to restate it. I don’t feel I had any confidence that even if she’s convinced by the evidence to whatever her standard

⁸ When the prosecutor asked to excuse Juror 50, nine of the first 10 prospective alternates had already been excused (six by Anderson and his codefendant Rivera; three by the People).

⁹ Both Anderson and codefendant Rivera are African Americans.

would be that she could actually do the job because of the hesitance that she showed in even being able to answer the question.”

The court said it had observed “the same thing, that she’s hesitant, very soft-spoken and didn’t finish her sentences.” The court then found “a reasonable and valid reason for the People to exercise a peremptory on that.”

Responding to the court, counsel for Anderson’s codefendant argued that, although Juror 50 was reserved and soft-spoken, and perhaps shy, she did not present as hesitant. To the contrary, when asked whether she could do her job, she said, “Yes.” The court replied that other jurors were also soft-spoken; but, based on Juror 50’s demeanor, it had a concern she would not be able to speak up if she disagreed with other jurors. The prosecutor then added, because the reporter’s transcript might be unclear, when Juror 50 did not finish her answers, it was not because he had interrupted her. Rather, “she would trail off, and there would be a period of silence before I would try to re-engage.” The court confirmed, “What you just stated is what happened.” The court then excused Juror 50.

b. *Governing law*

“Peremptory challenges are ‘designed to be used “for any reason, or no reason at all.”’ [Citations.] But there are limits: Peremptory challenges may not be used to exclude prospective jurors based on group membership such as race or gender. [Citations.] Such use of peremptory challenges violates both a defendant’s right to a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution, and his right to equal protection under the Fourteenth Amendment to the United States Constitution.”

(*People v. Armstrong* (2019) 6 Cal.5th 735, 765-766 (*Armstrong*); accord, *People v. Smith* (2018) 4 Cal.5th 1134, 1146; *People v. Winbush* (2017) 2 Cal.5th 402, 433.) “Exclusion of even one prospective juror for reasons impermissible under *Batson* and *Wheeler* constitutes structural error, requiring reversal.” (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158.)¹⁰ Nonetheless, “there is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination.” (*People v. Hensley* (2014) 59 Cal.4th 788, 802.)

A three-step procedure governs the analysis of *Batson*/*Wheeler* motions. (*Armstrong, supra*, 6 Cal.5th at p. 766; *People v. Smith, supra*, 4 Cal.5th at p. 1147.) “First, the defendant must make a prima facie showing that the prosecution exercised a challenge based on impermissible criteria. Second, if the trial court finds a prima facie case, then the prosecution must offer nondiscriminatory reasons for the challenge. Third, the

¹⁰ Although generally termed structural error, a *Batson*/*Wheeler* violation in the selection of an alternate juror is harmless if no alternates were used during the trial. (See *People v. Roldan* (2005) 35 Cal.4th 646, 703 [“[Because] no alternate jurors were ever substituted in, . . . it is unnecessary to consider whether any *Wheeler* violation occurred in their selection. Moreover, any *Batson* violation could not possibly have prejudiced the defendant”], disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Turner* (1994) 8 Cal.4th 137, 172 [“no alternate jurors were ever substituted in, and hence it is unnecessary to consider whether any *Wheeler* violation occurred in their selection”], disapproved on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5].) In this case, all four alternate jurors were ultimately seated.

trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the defendant has shown purposeful race discrimination. [Citation.] "The ultimate burden of persuasion regarding [discriminatory] motivation rests with, and never shifts from, the [defendant]."" (*Smith*, at p. 1147; accord, *Armstrong*, at p. 766 "[t]he defendant's ultimate burden is to demonstrate that 'it was more likely than not that the challenge was improperly motivated'"]; see *Johnson v. California* (2005) 545 U.S. 162, 168, 170.)

When, as here, the question on appeal is whether the trial court erred in its third stage ruling, the court having previously found a prima facie showing the challenge was based on impermissible criteria, "the genuineness of the justification offered, not its objective reasonableness, is decisive." (*Armstrong*, *supra*, 6 Cal.5th at p. 767; see *People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1158.) "[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339.) "Because the trial court's credibility determination may rest in part on contemporaneous observations unavailable to the appellate court, we review that determination "'with great restraint'" and will accord it deference '[s]o long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered,' affirming when substantial evidence supports the ruling." (*Armstrong*, at pp. 767-768; accord, *People v. Lenix*

(2008) 44 Cal.4th 602, 613-614; *People v. Burgener* (2003) 29 Cal.4th 833, 864.) A “reasoned” attempt requires the trial court to “reject [the prosecutor’s] reason or ask the prosecutor to explain further” when the reason is “not borne out by the record.” (*Gutierrez*, at p. 1172.)

“[I]n judging why a prosecutor exercised a particular challenge, the trial court and reviewing court must examine only the reasons actually given. ‘If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.’” (*People v. Jones* (2011) 51 Cal.4th 346, 365; accord, *People v. Miles* (2020) 9 Cal.5th 513, 542.)

c. *The court did not err in denying the defense motion*

Citing *Snyder v. Louisiana* (2008) 552 U.S. 472 (*Snyder*) and *People v. Long* (2010) 189 Cal.App.4th 826 (*Long*), two cases in which the trial court’s acceptance of the prosecutor’s race-neutral explanations for exercising peremptory challenges was reversed on appeal, Anderson argues the trial court here improperly supplied a reason for the challenge (that Juror 50 might not be able to speak up if she disagreed with other jurors) and erred in accepting the prosecutor’s explanation as sincere. While we agree the trial court’s additional explanation for striking Juror 50 is not properly considered in evaluating its decision overruling the *Batson/Wheeler* objection, neither case supports Anderson’s argument concerning the prosecutor’s stated reason—namely, his concern that what he perceived as her hesitant answers to his questions indicated Juror 50 would be reluctant to vote guilty even if the evidence established guilt beyond a reasonable doubt.

In *Snyder* the Supreme Court considered a prosecutor's excusal of an African-American college senior who was attempting to fulfill his student-teaching obligations. The prosecutor gave two reasons for exercising the challenge: The prospective juror looked nervous; and he had expressed concern jury service would interfere with his teaching time, which the prosecutor explained might cause him to try to quickly reach a verdict on a lesser charge. (*Snyder, supra*, 552 U.S. at p. 478.) As to the first proffered reason, the Supreme Court reaffirmed not only that a prospective juror's demeanor could be a proper, race-neutral basis for exercising a peremptory challenge but also that deference to the trial court's ruling is especially appropriate when the court has made a finding that an attorney had credibly relied on demeanor in striking the prospective juror. (*Id.* at p. 479.) In *Snyder*, however, "the record does not show that the trial judge actually made a determination concerning Mr. Brooks' demeanor. . . . Rather than making a specific finding on the record concerning Mr. Brooks' demeanor, the trial judge simply allowed the challenge without explanation." Because the record was silent on this point, the Court held it could not presume the trial court had credited the prosecutor's assertion the prospective juror was nervous. (*Ibid.*)

The *Snyder* Court found the prosecutor's second reason implausible. The prosecutor anticipated the trial could be brief, and it would be difficult to significantly shorten deliberations by urging a guilty verdict on a lesser charge. Several White prospective jurors had expressed concern about jury service interfering with work or personal obligations but were allowed to remain. And the challenged prospective juror's dean had assured the court he would work with the student to help him make up

any lost teaching time. (*Snyder, supra*, 552 U.S. at pp. 482-483.) Accordingly, the Court held, “The prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent.” (*Id.* at p. 485.)

Here, in marked contrast to *Snyder*, the trial court stated on the record that it, too, had observed Juror 50 to be hesitant and expressly found it was appropriate to exercise a peremptory challenge on this basis. And there was nothing inherently implausible about the prosecutor’s explanation that he was concerned the prospective juror’s hesitancy in answering his questions indicated she might be reluctant to return a guilty verdict even if the evidence justified it. We properly defer to the trial court’s determination under these circumstances. (See, e.g., *People v. Lenix, supra*, 44 Cal.4th at p. 613 [“prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons”]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1219 [trivial reasons such as body language and mode of answering questions are legitimate grounds so long as asserted in good faith], overruled in part on another ground in *People v. Gutierrez, supra*, 2 Cal.5th at p. 1174.)

Long, supra, 189 Cal.App.4th 826 is similarly distinguishable. In that case defense counsel questioned the prosecutor’s use of peremptory challenges to excuse prospective jurors who appeared to be Vietnamese (the case involved a Vietnamese victim and a Vietnamese defendant). The prosecutor explained she had excused prospective juror T.N. “because, during questioning of the entire panel, he did not participate in the discussion. Also he ‘did not make eye contact with me during the time throughout the entire process of us questioning the first

12 jurors, and it was based on that that I did not feel he was a participating member of the jury, and I did not feel comfortable with his body language and the way that he was expressing himself, or able to express himself in the context of a juror.” (*Id.* at p. 843.) The trial court found the peremptory challenge “legitimate” without further elaboration. (*Ibid.*)

In fact, T.N. had participated during questioning of the panel. As the court of appeal stated, the prosecutor’s contrary assertion “is demonstrably false from the reporter’s transcript.” (*Long, supra*, 189 Cal.App.4th at p. 843.) As for the prosecutor’s purported reliance on T.N.’s lack of eye contact and other body language, the appellate court, as had the Supreme Court in *Snyder*, emphasized that deference must be given to a trial court’s determination based on nonverbal cues, but concluded, “Doubt may undermine deference, however, when the trial judge makes a general, global finding that the prosecutor’s stated reasons were all ‘legitimate,’ and at least one of those reasons is demonstrably false within the limitations of the appellate record.” (*Id.* at p. 845.) Summarizing its understanding of the applicable law and reversing the appellant’s conviction, the court held, “[W]hen the prosecutor bases a peremptory challenge on an unrecorded aspect of a prospective juror’s appearance or behavior, we must and will look for some support in the record for the prosecutor’s observation. In this case, the record is devoid of any mention, let alone description, by the trial judge or the prosecutor of what was disturbing or unseemly about T.N.’s body language or his way of expressing himself. We are unable to extend normal deference to the trial court’s implied finding on this point when another stated reason, though pronounced

‘legitimate’ by the trial court, was demonstrably inaccurate.” (*Id.* at p. 848.)

In contrast to *Long*, the trial court here expressly agreed with the prosecutor’s characterization of Juror 50’s responses as hesitant; no finding need be implied. Although defense counsel disagreed, suggesting instead she was just soft-spoken and shy, even from the transcript it is apparent the prosecutor had difficulty in extracting a clear affirmative declaration from Juror 50 that she would return a guilty verdict if the evidence established guilt beyond a reasonable doubt. And, again unlike in *Long*, the prosecutor provided a case-related, racially neutral explanation why that aspect of Juror 50’s demeanor caused him to request her excusal. The trial court committed no error in denying defense counsel’s motion.

2. *The Court Did Not Err in Refusing To Provide Additional Instructions on the Murder Charge*

Late in the morning of the second day of deliberations the jury sent the following note: “Q) Explanation of the difference between first degree and second degree? *Explanation and clarification.” The court responded in writing, “The jury instruction on page 30 defines murder. If the jury decides there was a murder committed, then the jury has to decide whether it was a first degree murder by using the instructions on pages 31 and 32. [¶] All murders are second degree unless the requirements of first degree murder are met.” Following its lunch break the jury sent another note, stating, “Explanation of premeditation.” The court again responded in writing, “The jury instructions on pages 31 and 36 explain the premeditation required for a first degree murder.” Late that afternoon the jury

returned with its verdicts finding Anderson guilty of first degree premeditated murder and attempted premeditated murder.

Anderson does not contend the evidence at trial was insufficient to convict him of the premeditated murder of Ramon or the attempted premeditated murder of Allas. Nor does he contend the trial court improperly instructed the jury on the elements of murder, the difference between first and second degree murder or the definition of premeditation.¹¹ However, he argues the court erred when it responded to the jury's questions simply by referring to the instructions it had previously given. Even if not forfeited by his counsel's failure to object (see *People v. Dykes* (2009) 46 Cal.4th 731, 802; *People v. Roldan* (2005) 35 Cal.4th 646, 729),¹² Anderson's contention lacks merit.

Section 1138 provides, "After the jury have retired for deliberation . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after

¹¹ The court instructed the jury with CALCRIM Nos. 500 (Homicide: General Principles), 520 (First or Second Degree Murder with Malice Aforethought), 521 (First Degree Murder), 522 (Provocation: Effect on Murder), 562 (Transferred Intent), 600 (Attempted Murder) and 601 (Attempted Murder: Deliberation and Premeditation).

¹² Although the court's minute orders for May 15, 2018 indicate counsel were notified about both notes, neither the minute orders nor the reporter's transcript indicates counsel were advised of the planned responses or that any discussion about them took place between the court and counsel.

they have been called.” The Supreme Court has explained, “The court has a primary duty to help the jury understand the legal principles it is asked to apply.” (*People v. Beardslee* (1991) 53 Cal.3d 68, 97; accord, *People v. Cleveland* (2004) 32 Cal.4th 704, 755; see *People v. Smithey* (1999) 20 Cal.4th 936, 985; *People v. Hodges* (2013) 213 Cal.App.4th 531, 539 [under section 1138, a jury’s inquiry “‘impose[d] upon the court a duty to provide the jury with information the jury desires on points of law’”].) However, “[t]his does not mean the court must always elaborate on the standard instructions. When the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury’s request for information.” (*Beardslee*, at p. 97; accord, *People v. Lua* (2017) 10 Cal.App.5th 1004, 1017 [“the trial court does not abuse its discretion when it determines the best way to aid the jury is by directing the jury to reread the applicable jury instructions that ‘are themselves full and complete’”].) “Indeed, comments diverging from the standard are often risky.” (*Beardslee*, at p. 97.)

We review the trial court’s responses to the deliberating jury’s questions for abuse of discretion. (See *People v. Waidla* (2000) 22 Cal.4th 690, 745-746 [“[a]n appellate court applies the abuse of discretion standard of review to any decision by a trial court to instruct, or not to instruct, in its exercise of its supervision over a deliberating jury”]; *People v. Kopp* (2019) 38 Cal.App.5th 47, 65, review granted Nov. 13, 2019, S257844.)

Both of the court’s responses were well within its discretion. Asked the difference between first and second degree murder, the court did not simply tell the jury to reread the instructions it had previously given. (See *Beardslee*, *supra*,

53 Cal.3d at p. 97 “[A] court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given”].) Rather, the court reminded the jury of the multiple steps required before it could find Anderson or his codefendant guilty of first or second degree murder: First, it had to decide there had been a murder, and the court directed the jury to the instruction containing the definition of the crime. The court then advised the jury the baseline for murder was second degree (“all murders are second degree unless . . .”) and directed it to the instructions describing the elements necessary for a finding of first degree murder. In the absence of any indication the jury was confused or misunderstood this portion of the lengthy instructions it had been given covering seven different crimes and two defendants, the court’s clear response with specific reference to full and accurate jury instructions was appropriate.

Later (following a lunch break and further deliberations), when the jury asked for an explanation of premeditation, the court referred it to the two instructions defining that concept. Again, the jury’s simple question did not reflect any confusion about a specific aspect of the legal definition of that term, and attempting to explain it in different language is particularly problematic. The court’s decision to rely upon the approved definition as set forth in the CALCRIM instructions was not an abuse of its discretion. (See, e.g., *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212-1213 [court did not abuse its discretion when it decided, in response to jury request to clarify the meaning of malice in the context of CALJIC homicide

instructions, to direct the jury to reread the instructions on that topic]; *People v. Kopp, supra*, 38 Cal.App.5th at p. 65 [when jury asked “what constitutes a deadly weapon,” court properly referred jury to CALCRIM No. 875 definition it had previously given].)

3. *Although Sufficient Evidence Supports the Finding Anderson Committed False Imprisonment by Violence or Menace, the Court Erred in Failing To Instruct on the Lesser Included Misdemeanor Offense*

“False imprisonment is the unlawful violation of the personal liberty of another.” (§ 236.) It occurs when the defendant intentionally restrains, confines or detains another person without his or her consent for ““an appreciable length of time, however short.”” (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 715.) When the restraint on the victim’s personal liberty is accomplished by violence, menace, fraud or deceit, it is a felony. (§ 237, subd. (a).) In the case of felony false imprisonment by violence, the force used to accomplish the restraint must be something greater than that reasonably necessary to effect the restraint. (*People v. Williams* (2017) 7 Cal.App.5th 644, 672 [“[v]iolence is the exercise of physical force used to restrain over and above the force reasonably necessary to effect such restraint”; internal quotation marks omitted]; *People v. Dominguez* (2010) 180 Cal.App.4th 1351, 1357 [““Misdemeanor false imprisonment becomes a felony only where the force used is greater than that reasonably necessary to effect the restraint. In such circumstances the force is defined as ‘violence’ with the false imprisonment effected by such violence a felony””]; *People v. Hendrix* (1992) 8 Cal.App.4th 1458, 1462 [same].) “Menace” for purposes of felony false imprisonment is defined as ““a threat of

harm express or implied by word or act.””” (*People v. Reed* (2010)
78 Cal.App.4th 274, 280; accord, *Williams*, at p. 672.)

Anderson contends the evidence was insufficient to show he and his confederate used any more force than was necessary to restrain Yang's movement during the Glendale home invasion robbery.¹³ Alternatively, he argues, even if the evidence supported his conviction, there was sufficient evidence to require the trial court to instruct sua sponte on misdemeanor false imprisonment as a lesser included offense of the crime charged. (See *People v. Westerfield* (2019) 6 Cal.5th 632, 718 [it is the trial court's duty to instruct the jury not only on the crime with which

¹³ In considering a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. A reversal for insufficient evidence is unwarranted unless it appears that upon no hypothesis whatever is there sufficient substantial evidence to support the jury's verdict." (*People v. Penunuri* (2018) 5 Cal.5th 126, 142, citations and internal quotation marks omitted; accord, *People v. Dalton* (2019) 7 Cal.5th 166, 243-244; *People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

the defendant has been charged, but also on any lesser offense that is both included in the offense charged and shown by the evidence to have been committed]; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1327 [same].) We disagree with Anderson's first contention but agree the trial court committed prejudicial error by failing to instruct on misdemeanor false imprisonment as a lesser included offense.

Although the robbers told Kang, an older woman, they would not hurt her and brought her a cup of water when she requested it, they were nevertheless two male intruders who confronted her wearing masks and gloves. One of the men initially held a pair of scissors in his fist, not through the handle holes; the men twice attempted to bind and gag her while she was seated in the chair they had instructed her to use; one stood guard over her while the other searched the home for valuables; and she was told to remain quiet, arguably an implicit threat of harm if she did not comply. (See *People v. Islas* (2012) 210 Cal.App.4th 116, 126-127.) Kang was sufficiently frightened during the robbery that she nearly fainted, and officers responding to her home after the robbers left described her as visibly shaken. (See *People v. Williams, supra*, 7 Cal.App.5th at p. 673 ["[t]he jury may properly consider fear as evidence of menace" for purpose of felony false imprisonment]; *Islas*, at p. 127 [same].) Taken together, this evidence supported the jury's finding that the intruders' words and actions threatened violence if Kang did not comply with their directions.

While sufficient to support the guilty verdict of felony false imprisonment, the intruders' actions inside Kang's home—the fact they never brandished a weapon, spoke softly, provided her with water when she asked for it and were, in Kang's own words,

“very nice”—could reasonably have been found by a properly instructed jury to constitute only misdemeanor false imprisonment. That is, there was substantial evidence from which a jury could conclude the intruders used no greater force or restraint than necessary to effect Kang’s involuntary detention. Accordingly, the court was required to instruct on the lesser included offense. (*People v. Vargas* (2020) 9 Cal.5th 793, 827 “[a] trial court must instruct a jury on lesser included offenses when the evidence raises questions regarding whether every element of a charged offense is present”].)

To be sure, as the Attorney General points out, at trial Anderson did not dispute Kang’s version of events or argue the evidence did not prove violence or menace had been used. His defense was that he was not one of the intruders. But the trial court’s sua sponte obligation to instruct on all lesser included offenses is not dependent on the defense theory of the case. (See *People v. Moye* (2009) 47 Cal.4th 537, 548 [trial court must instruct on an uncharged lesser included offense when the evidence raises a question whether all the elements of the charged offense were present “even when, as a matter of trial tactics, a defendant not only fails to request the instruction, but expressly objects to its being given”].)

Finally, the Attorney General argues any error in omitting the misdemeanor false imprisonment instruction was harmless under *People v. Watson* (1956) 46 Cal.2d 818 because it is not reasonably probable the jury would have returned a different verdict had it been so instructed. (See *People v. Moye, supra*, 47 Cal.4th at pp. 555-556 [*Watson* standard of prejudice applies to omission of instruction on lesser included offense]; *People v. Breverman* (1998) 19 Cal.4th 142, 178 [“in a noncapital case,

error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under *Watson*”).) Given the absence of an express threat of harm and Kang’s testimony the men treated her very nicely, we cannot agree. On this record it is reasonably probable at least one juror may have voted to convict Anderson of the misdemeanor offense, not the felony. (See *People v. Soojian* (2010) 190 Cal.App.4th 491, 520 “[i]t appears that under the *Watson* standard a hung jury is considered a more favorable result than a guilty verdict”]; see also *People v. Walker* (2015) 237 Cal.App.4th 111, 118 [evaluating likely impact of instructional error on “at least one juror”]; *People v. Sanchez* (2014) 228 Cal.App.4th 1517, 1535 [quoting *Soojian*].)

4. *Anderson Will Have the Opportunity To Request an Ability-to-pay Hearing on Remand*

In *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) this court concluded, “[T]he assessment provisions of Government Code section 70373 and Penal Code section 1465.8, if imposed without a determination that the defendant is able to pay, are . . . fundamentally unfair; imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution.” (*Dueñas*, at p. 1168; accord, *People v. Belloso* (2019) 42 Cal.App.5th 647, 654-655 (*Belloso*), review granted Mar. 11, 2020, S259755.) A restitution fine under Penal Code section 1202.4, subdivision (b), however, “is intended to be, and is recognized as, additional punishment for a crime.” (*Dueñas*, at p. 1169; accord, *Belloso*, at p. 655.) And Penal Code section 1202.4, subdivision (c), expressly provides a defendant’s inability to pay a restitution fine may not

be considered a “compelling and extraordinary reason” not to impose the statutory minimum fine. Accordingly, as held in *Dueñas*, to avoid a serious constitutional question if a restitution fine were to be imposed on an indigent defendant, “the court must stay the execution of the fine until and unless the People demonstrate that the defendant has the ability to pay the fine.” (*Dueñas*, at p. 1172; accord, *Belloso*, at p. 655.)¹⁴

As part of Anderson’s sentence the trial court imposed a \$240 court operations assessment (Pen. Code, § 1465.8), a \$180 court facilities assessment (Gov. Code, § 70373) and a \$300 restitution fine (Pen. Code, § 1202.4, subd. (b)). Relying on *Dueñas*, Anderson argues these assessments and fine must be stayed because the People failed to present any evidence he had the ability to pay them and the trial court made no finding he could do so.

The People respond that Anderson forfeited the *Dueñas* issue because he failed to raise it at his sentencing hearing, which took place several months before *Dueñas* was decided, urging us in this regard to follow the decision in *People v. Frandsen* (2019) 33 Cal.App.5th 1126, rather than our own decision in *People v. Castellano* (2019) 33 Cal.App.5th 485, which rejected the precise forfeiture argument made here. On the merits, the People argue, using an Eighth Amendment rather than a due process clause analysis, the restitution fine was not grossly disproportional to the gravity of Anderson’s offense and,

¹⁴ The following issues are presently pending before the Supreme Court in *People v. Kopp*, *supra*, S257844: “Must a court consider a defendant’s ability to pay before imposing or executing fines, fees, and assessments? If so, which party bears the burden of proof regarding defendant’s inability to pay?”

therefore, was not unconstitutionally excessive. They also assert, as a punitive fine, it did not violate due process. And while conceding a due process violation in imposition of the nonpunitive court operations and court facilities assessments without any inquiry into Anderson's ability to pay, they argue the error was harmless beyond a reasonable doubt because Anderson will be able to earn the relatively small amounts involved while in prison.

In *Belloso* we rejected the contention a constitutional challenge to imposition of fines and fees on an indigent defendant should be reviewed under an excessive fines analysis instead of using a due process framework and reconfirmed the holding in *Dueñas* that imposition of a restitution fine upon an indigent defendant raises serious due process concerns. (*Belloso, supra*, 42 Cal.App.5th at pp. 655, 660.) The People present no persuasive reason for us to reconsider our analysis.

As for the People's harmless error analysis, even if we could conclude beyond a reasonable doubt on the limited record before us that Anderson's future earning capacity while in prison demonstrated an ability to pay the various assessments imposed, because we must remand the case for a possible retrial on the false imprisonment charge and for resentencing in any event, Anderson will have the opportunity in the trial court to request a hearing concerning his ability to pay fines, fees and assessments.

DISPOSITION

Anderson's conviction for false imprisonment by violence or menace is reversed. All other convictions are affirmed. Anderson's sentence is vacated, and the matter is remanded for possible retrial for false imprisonment. At the conclusion of any retrial, or if the prosecution elects not to retry Anderson, the

court is to resentence Anderson, including by correcting the sentence for attempted premeditated murder, and to consider, if requested, Anderson's ability to pay fines, fees and assessments.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.